No. 09-679

Supreme Court, U.S.
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In The

Supreme Court of the United States

GAIL PARKERSON,

Petitioner,

v.

RICHARD MCMURTREY, SANDRA MCMURTREY, ERNIE'S WRECKER & BODY SHOP, INC. & JOHN DOE NO. 1 AS GARLAND COUNTY, ARKANSAS,

Respondents.

On Petition For Writ Of Certiorari To The Arkansas Court Of Appeals

RESPONDENTS RICHARD MCMURTREY'S AND SANDRA MCMURTREY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment was violated when the trial judge refused Petitioner's motion to recuse.

2. Whether the Due Process Clause of the Fourteenth Amendment was violated when the trial judge denied Petitioner's motions.

3. Whether the Due Process Clause of the Fourteenth Amendment was violated when the trial court's ruling was not reversed on the basis of Petitioner's claim the transcript was not complete on appeal.

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OPINION BELOW

The opinion of the state court that is the subject of this Petition is not published, but is located at Petitioner's Appendix 1.

STATEMENT OF JURISDICTION

The Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Respondent Richard McMurtrey purchased two tracts of land on Bayshore Drive in Garland County, Arkansas in 2002.

On March 26, 2004, the Petitioner filed suit against Respondents seeking to quiet title to a tract of land in Garland County, Arkansas. Respondent Richard McMurtrey filed a counter-complaint to quiet title to one of the parcels he purchased in 2002, which Respondents believed to be a part of the tract claimed by Petitioner.

The case was assigned to Division I of the Circuit Court for Garland County, Arkansas. In 2005, the case was transferred to Division IV on an exchange of cases with a recently appointed judge.

Petitioner moved for the Division IV judge to recuse. The motion was denied. Petitioner's motion

was based upon the assertion the judge had, two years previously, entered an appearance as a prosecutor in a separate criminal action against Petitioner in district court. The only evidence of the judge's participation in the criminal matter presented by Petitioner was a Motion to Dismiss Appeal filed by the judge while he was an assistant prosecutor.

Respondents and Petitioner appeared for trial of this case on August 16, 2005. The court continued the trial because of a schedule conflict. During that court appearance the judge announced and set a March 13, 2006, pre-trial date, an April 17, 2006, trial date, and ordered mediation. The Petitioner was present in court for the announcement and settings and participated in the proceeding.

All motions were to be argued March 13, 2006, at pre-trial. Petitioner did not appear at the pre-trial hearing to argue her pending motions. Trial was held as scheduled on April 17, 2006.

Respondents were granted a directed verdict at the close of Petitioner's case, the Petitioner not having offered into evidence a legal description or survey, or testimony showing the boundaries of the property which she claimed by adverse possession.

Respondent Richard McMurtrey presented his counter-complaint and the trial court quieted title to Respondent to the land he claimed.

Respondents disagree with the facts in Petitioner's Statement of the Case almost in its entirety

as to matters not raised at trial or on appeal. Because the discrepancies are too numerous to mention, a few are as follows:

i. There was an approximate two-year lapse in time between the trial judge's filing of a pleading in the prosecution of Petitioner on an unrelated criminal matter and receiving this case on exchange with Division I;

ii. Petitioner's adverse possession was not acknowledged nor documented;

iii. There were no extraordinary circumstances necessitating the recusal of the trial judge;

iv. The scenario described by Petitioner of the trial judge coming into the courtroom in his robe close to the parties, looking at Petitioner, and stating he was not going to recuse did not occur. There were no off the record statements by the trial judge at any time. It was not contained in the record, because the claimed event did not occur;

v. The Respondents further disagree with Petitioner's assertion she was not notified of the trial date. She was present at the time the court set and announced the trial date and pre-trial date and never disputed that fact. Petitioner received the same notice as all other parties and had sufficient time to subpoena witnesses;

vi. Motions made by Petitioner were not ruled on because Petitioner was not present to present her motions, even though she was told in court of the

pre-trial date and that all motions would be argued at the pre-trial;

vii. Petitioner did not request a jury trial under Ark. R. Civ. P. 38.

ARGUMENT

CERTIORARI IS NOT WARRANTED

The state court's failure to reverse on the issue of the judge's refusal to recuse is not in conflict with this Court's prior decisions and does not constitute a denial of Due Process under the Fourteenth Amendment.

Petitioner describes statements she said the trial judge made in an off the record communication to the parties in the courtroom. No unrecorded statements were made by the judge.

Respondents object to the inclusion of claimed events and facts not presented at trial, nor argued on appeal, and which have no bearing to this case or the Petition for Writ of Certiorari other than to cause confusion.

Respondents point out the following inaccuracies in the statements included in Petitioner's Reasons for Granting the Petition.

i. Petitioner alleges a malicious prosecution against her without any documentation or evidence of a malicious prosecution. No such evidence was

introduced at any level of the proceedings. The fact that a dismissal of the criminal case against Petitioner occurred does not mean the prosecution was malicious;

ii. The Petitioner described facts relating to her work as a counselor and made accusations against judges from prior unrelated and unidentifiable cases. Even if such cases existed, actions of other judges are not relevant to this case. Respondents object to the document at Petitioner's Appendix 25 being included in her Petition;

iii. The stories about malpractice claims, two neurosurgeons, and the FBI are raised for the first time and are not relevant to the issue of bias or lack of bias of the judge in this case;

iv. The allegations regarding anonymous calls from individuals and subsequent cases are not relevant and are mentioned for the first time in this brief.

In Arkansas a trial judge need not recuse in unrelated litigation simply because he or she prosecuted a party in another case. *Cooper v. State,* 317 Ark. 485, 490, 879 S.W. 2d 405, 408 (1994).

The reasons for judicial disqualification asserted by Petitioner in this case go to personal bias. Matters of kinship, personal bias, state policy, and remoteness of interest are matters of legislative discretion. *Tumey v. Ohio,* 273 U.S. 510, 523 (1927).

The judge had no direct or even remote financial interest in the outcome of Petitioner's case. Petitioner

believes the judge holds a personal bias against her and she relies solely upon the unrelated criminal prosecution and statements the judge never made.

That portion of Petitioner's argument relating to the state court's failure to reverse because her motions were denied is not a basis for certiorari. Petitioner failed to obtain specific rulings on her motions for a new trial and to inspect, and she did not preserve the issue for appeal. It is not a denial of Due Process.

That portion of Petitioner's argument relating to the state court's failure to reverse because she claimed the record on appeal was incomplete is not a basis for certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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